Lokhman bin Abu v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P–09–17 OF 1996
GOPAL SRI RAM, MOKHTAR SIDIN AND ABDUL KADIR SULAIMAN JJCA
28 NOVEMBER 2000

Criminal Procedure *— Trial — Prosecution's case — Introduction of cautioned statement — Court to ascertained from unrepresented accused that statement was voluntarily made — Failure to comply with s 257(1) of Criminal Procedure Code — Whether failure of justice*

In this appeal, the accused complained that the main points of the prosecution case were not explained to the him as required by s 257(1) of the Criminal Procedure Code. Another issue pertained to the way the cautioned statement was introduced.

Held, dismissing the appeal:
There was a clear breach of s 257(1) of the Criminal Procedure Code. Also, the way in which the cautioned statement was introduced was unsatisfactory. In a case where an accused is unrepresented, it is desirable in the interests of justice, when a cautioned statement is sought to be introduced in evidence, for the court at that stage to ascertain from the accused whether he accepts that it was made voluntarily. If he does not, then the court should proceed to conduct a trial within a trial to determine the admissibility of the statement in accordance with settled principles (see p 313F–G). The failure to do so would attract different consequences in each case, according to its own facts. In this case, having scrutinized the evidence, the court was satisfied that there had not been a miscarriage of justice (see p 313H).

[**Bahasa Malaysia summary**

Dalam rayuan ini, tertuduh mengadu bahawa perkara-perkara utama di dalam kes pendakwaan tidak dijelaskan kepadanya seperti yang dikehendaki oleh s 257(1) Kanun Prosedur Jenayah. Isu yang lain adalah mengenai cara pernyataan beramaran diberikan.

Diputuskan, menolak rayuan tersebut:
Terdapat perlanggaran yang jelas s 257(1) Kanun Prosedur Jenayah. Cara pernyataan beramaran diberi juga tidak memuaskan. Di dalam kes di mana tertuduh tidak diwakili, adalah wajar demi kepentingan keadilan bahawa apabila pernyataan beramaran dikemukakan sebagai keterangan, mahkamah dikehendaki memastikan sama ada tertuduh bersetuju yang beliau membuat pernyataan beramaran tersebut secara sukarela atau tidak. Jikalau tidak, mahkamah sepatutnya menjalankan perbicaraan dalam perbicaraan untuk memutuskan kebolehterimaan

pernyataan tersebut bersesuaian dengan prinsip-prinsip yang ditetapkan (lihat ms 313F–G). Kegagalan membuat demikian mempunyai akibat-akibat yang berlainan di dalam kes-kes yang berlainan, mengikut fakta-fakta kes tersebut. Setelah meneliti segala keterangan, mahkamah ini berpuas hati bahawa tiada ketidakadilan di dalam kes ini (lihat ms 313H).]

Notes

For cases on prosecution's case, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3509–3513.

Cases referred to

Juraimi bin Husin v PP [1998] 1 MLJ 537 (refd)
Lim Chow Keng v PP [1973] MLJ 156 (refd)
Ratten v R [1974] 1 CLR 510 (refd)
Shaari v PP [1963] MLJ 22 (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code ss 257, (1), 323, 422

Appeal from: Criminal Application No 42–188 of 1995 (High Court, Pulau Pinang)

Karpal Singh (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Zauyah Bee bte Loth Khan (Attorney General's Chambers) for the respondent.

Gopal Sri Ram JCA. (delivering oral judgment): The substance of the complaint in this appeal is that the main points of the prosecution case were not explained to the appellant as required by s 257(1) of the Criminal Procedure Code. There is abundant authority in support of the proposition that a departure from the provisions of the Criminal Procedure Code is a ground upon which an appellate court may intervene.

There is however, an important qualification to that rule. It is that the power is not exercisable if there is no miscarriage of justice, or a 'failure of justice' — the phrase employed by s 422 of the Criminal Procedure Code.

The provision to s 422 of the Criminal Procedure Code is in pari materia with the proviso to s 60 of the Courts of Judicature Act 1964. Both these sections have received judicial treatment. It is now settled that if there is sufficient evidence to warrant the conviction, that would be a good ground for holding that there was no miscarriage or failure of justice.

In *Juraimi bin Husin v PP* [1998] 1 MLJ 537, this court had occasion to apply the following dictum of Barwick CJ in *Ratten v R* [1974] 1 CLR 510 at p 586:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. *It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of like mind.* But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration. (Emphasis added.)

Much the same approach was adopted by *Shaari v PP* [1963] MLJ 22, where at p 23, the learned judge said:

> In the case before me, the accused was able, as shown in the evidence, to explain the evidence given and in my opinion, if the magistrate had accepted his denial of the knowledge of the bananas, he would be acquitted. In other words, though the magistrate had failed to explain the main points of the evidence against the appellant, he was able in his defence to give an intelligent reply.
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> I would, therefore, although s 257 of the Criminal Procedure Code did appear at first sight to be mandatory by reason of the words '*shall call* his attention', I would say that, having regard to what had taken place subsequent to that the accused had not been prejudiced in his defence and would, therefore, say that in the present case the failure by the Magistrate to comply with the provision of the section had not occasioned any prejudice or a reasonable probability of prejudice but is an omission curable under s 422 of the Criminal Procedure Code.

We have examined the record in the present case with much anxiety. We are in agreement with Mr Karpal Singh that there was a clear breach of s 257(1) of the Criminal Procedure Code. We are also in agreement with him that the way in which the cautioned statement was introduced was unsatisfactory. In our judgment, in a case where an accused is unrepresented, it is desirable in the interests of justice, when a cautioned statement is sought to be introduced in evidence, for the Court at that stage to ascertain from the accused whether he accepts that it was made voluntarily. If he does not, then the court should proceed to conduct a trial within a trial to determine the admissibility of the statement in accordance with settled principles.

The failure to do so would attract different consequences in each case, according to its own facts. In our case, having scrutinised the evidence, we are satisfied that there has not been a miscarriage of justice or to borrow the words of s 422 of the Criminal Procedure Code, a failure of justice. Having satisfied ourselves that the conviction is safe from any tainted evidence we find it unnecessary for the respondent to reply.

In the circumstances, the appeal against conviction is dismissed.

Having invited counsel for the appellant to submit on the issue of sentence, we agree that the learned judge of intermediate appeal erred in enhancing the sentence in plain disregard of the provisions of s 323 of the Criminal Procedure Code. See *Lim Chow Keng v PP* [1973] MLJ 156.

In the circumstances, we intervene and set aside the sentence imposed by the High Court and restore the sentence imposed by the sessions court.

Appeal dismissed.

Reported by Wong Ee Lynn